Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

PETER E. BELL,
PETITIONER

v.

JOHN E. POTTER, Postmaster General
of the United States Postal Service,
RESPONDENT

On petition for a Writ of Certiorari to the
United States Court of Appeals for the
Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the District Court and the Court of Appeals Opinion and Order, conflict with settled case law precedent in granting summary judgment and affirming it against petitioner as a matter of law?

2. As a matter of law, should a verdict been entered in favor of the Petitioner, when the Respondent, in the District Court's words, "tacitly conceded" by not responding to the petitioner's prima facie case of retaliation and because the petitioner's facts were uncontested under the framework of *McDonnell Douglas? McDonnell Douglas Corp. v. Green*, 411 U.S. 792, (1973)

3. Did the Respondent's written statement on the Petitioner's interview form, citing something the petitioner *allegedly* said or done during the ADR, (Redress Hearing) violate the provisions of section 704(a) of Title VII?

PARTIES TO PROCEEDING

The caption of the case includes all parties to the proceeding in the district court and court of appeals.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-2732
PETER E. BELL
PETITIONER
v.
JOHN E. POTTER, POSTMASTER OF THE UNITED STATES POSTAL SERVICE

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Peter E. Bell respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals (App. A)
The opinions of the District Court (App. B, C and D)

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 2002. The Court of Appeals had jurisdiction under 28 U.S.C. section 1291. This Court has jurisdiction over this petition under 28 U.S.C. section 1254 (1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Title VII, the Civil Rights Act of 1964, the amendment of 1991 for section 1981a(a)(1) is on pages 6 through 13.

STATEMENT OF THE CASE

Based on a claim filed with the Postal Service Equal Employment Opportunity Commission (EEOC) by Peter E. Bell. He brought this action against respondent in the United States District Court for the District of Northern Illinois, alleging that the respondent had engaged in unlawful employment practices against him and had retaliated against him because of his participation in ADR, Alternative Dispute Resolution. Petitioner alleged the Respondent had breached the settlement agreement both parties entered into and seek judicial review of the final agency decision.

The respondent filed a motion to dismiss or in an Alertnate a motion for summary judgment, the district court denied in part and granted in part. The district court dismissed the petitioner's retaliation claim, his ADEA, Race, Color and gender Discrimination Claims in its opinion. (District Court Opinion, November 16, 2000) (App. Page 2) August 2001, the Respondent filed a motion summary judgment. Petitioner responded to the motion, September 2001, in his response, petitioner argued that the District Court had erred in dismissing his retaliation claim and cited settled cited case law precedent to support his argument. The Respondent failed to respond to Petitioner's prima facie case of retaliation, in his Complaint or in his response to the Motion. In fact the Respondent never had an affirmative defense for petitioner's retaliation claim, until January 2002, when he amended his affirmative defense to include a defense for the retaliation claim. December 19, 2001 the District Court recognized its error, stating "the court recognizes it may have prematurely dismissed Bell" retaliation claim (a point the Postmaster General also tacitly concedes by not responding to it in his reply brief)." (App. Page # 2, District Court Opinion, December 19, 2001, page 15) The District Court conclusion, "For that reason, the court is ordering the parties to appear for a status hearing to discuss the possible reinstatement of this claim.

The District Court ordered the parties to appear for a status hearing to discuss the possible reinstatement of the claim. January 2, 2002 the parties appeared before the District Court. The respondent had made a statement to the Judge, the Petitioner was not in the courtroom at that time, and the Judge did not inform the petitioner of the statement, only that he would make a decision by mail. When the petitioner received the notice from the court it stated it was reinstating the retaliation claim and giving the respondent leave to file a motion for summary judgment on the retaliation claim. January 23, 2002, the district court cited the due dates for the summary judgment motion, due March 1, 2002, response due April 1, 2002 and reply due April 11, 2002. The respondent never filed a motion to move the Court for such dates. The respondent file its motion on the date issued by the court and the petitioner responded to the motion. Petitioner argued to the District Court that it erred in its decision, when a respondent/defendant remains silent when faced with a presumption. He brought the district court's attention to settled case law precedent (when a defendant remains silent and what happens at that point) that rejects the conclusion of the district court, in its December 19, 2001 Opinion, which was ignored.
The Supreme Court in, O'Connor v. Consolidated Coin Caterer, ___U.S.___ (1996), "If the trier of the fact finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent, the court must enter judgment for the plaintiff." In St. Mary's Honor Center, supra, at 509-510, and n. 3; Texas Dept. of Community Affairs v. Burdine, 450 U. S. 248, 254 (1981); The United States Supreme Court in St. Mary's Honor Center v. Hicks (quoting) Burdine, "If the employer is silent in the face of the presumption, the Court must enter judgment for plaintiff." Id, at 254; see ante, at 510, n 3. (also see ante, at 513). (quoting the Supreme Court in St. Mary's Honor Center

v. Hicks) Under the McDonnell Douglas and Burdine, however, proof of a prima facie case not only raises an inference of discrimination; in the absence of further evidence, it also creates a mandatory presumption in favor of the plaintiff, 450 U.S. 254, n 7. Although the employer bears no trial burden at all until the plaintiff proves his prima facie case, once the plaintiff does so, the employer must either respond or lose. As we made clear in Burdine, "If the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff." Id., at 254; see ante, at 510, n 3. (in these circumstances, the fact finder "must find the existence of the presumed fact of unlawful discrimination and must, therefore, render a verdict for the plaintiff") (emphasis in original). Thus, if the employer remains silent because it acted for a reason it is too embarrassed to reveal, or for a reason it fails to discover, see ante, at 513, the plaintiff is entitled to judgment under Burdine.

The District Court, nevertheless, granted the respondent's motion for summary judgment (in its May 2002 Opinion), finding that the petitioner did not have direct evidence of retaliation and did not satisfy the elements of his prima facie case for retaliation. Petitioner in his appeal brief argued the District Court erred in its Opinion, because, first, the District Court acknowledged that the Respondent had "tacitly conceded" to his prima facie case of retaliation and had admitted to all of his allegations in his Complaint. Second, the District Court had everything it needed in its December 19, 2001 Opinion to rule in the Petitioner's favor, because the Respondent had conceded. Third, Petitioner cited settled case law precedent from the Supreme Court that rejects the District Court's Conclusion, "reinstatement" when an employer or defendant remains silent when faced with a presumption. Forth, Respondent never denied the fact that he had "tacitly conceded" when faced with the presumption. The Court of Appeals did not address these facts and affirmed the District Court Opinion, concluding

the Petitioner did not present direct evidence of retaliation and that he failed to establish a prima facie case of retaliation, relying on Stone v. City of Indianapolis, 281 F. 3d 640, 644 (7th Cir. 2000). (Court of Appeals Order, November 20, 2002)

The District Court and the Court of Appeal's Opinion and Order conflicts with its prior settled case law precedent and of other Circuits settled case law precedent. see Hoffman v. MCA, Inc., 144, F. 3d 1117, 1122, (7th Cir. 1998); Stopka v. Alliance of Am. Insurers, 141 F. 3d 681, 688 (7th Cir. 1998); Cowman v. Glenbrook Sec. Servs., In., 123 F. 3d 438, 443, (7th Cir. 1997); Veprinsky v. Fluor Daniel, In., 87 F. 3d 553, 582, 593, 881 (7th Cir. 1996); Aviles v. Cornell Forge Comp, Inc., No. 96-C-5989, (7th cir. 1996); Thompkins v. Morris Brown Coll., F. 2d 561, 563 (11th Cir. 1985); Merritt v. Dillard Paper Co., 120 F. 3d 1181, 1189 (11th Cir. 1989)

The District Court and the Appeals Court relied on Stone 281 F. 3d at 644, stating the petitioner did not identify any similarly situated applicants who were hired by the Postal Service. The only comparison of potential postal employees provided by Bell were applicants and their test score, but this was not among the reasons that the Postal Service articulated for not hiring Bell. Bell provided no evidence of successful applicants with a similar criminal history and employment history. (Court of Appeals Order, page 3, November 20, 2002)
The Petitioner and the Respondent entered into a contractual relationship with the settlement agreement. Once a contractual relationship of employment is established, the provisions of Title VII attach and govern certain aspects of that relationship. In the context of Title VII, the contract of employment may be written, or oral, formal or informal; an informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace. The contractual relationship of employment triggers the provision of Title

VII governing "terms, conditions, or privileges of employment". Title VII in turn
forbids discrimination on the basis or "race, color, religion, sex, or national origin. (also protected Activity) see Hishon v. King & Splading, 467 U.S. (1984)
The respondent testified that the petitioner completed everything that he was supposed to do with respect to hiring and interviewing. (Wolski's deposition, page #40, line15)
The inquiry into the existence of a prima facie case in all cases reduces to whether the plaintiff has produced "evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion." (in this case a retaliatory criterion) see O'Connor v. Consolidated Coin Caterers Corp., 517 U. S. 308, 312 (1996) (emphasis and brackets omitted). Petitioner made a prima facie case of retaliation in his Complaint and in his response, to the August 2000, (the second) motion for summary judgement, which was uncontested. Petitioner argued the respondent's statement on his interview form was based on something he allegedly said and or done during the Redress Hearing. see Robinson v. PPG Indus., Inc., 23 F. 1159, 1164-66 & nn. 2-3. (7th Cir.1994) Petitioner testified that the statement was a lie. (Bell's deposition, page 47, lines 23 and 24) Wolski testified that there was no Assault charge on the petitioner's criminal record. (Wolski's deposition, page # 23, line 3) Wolski testified that the petitioner's criminal convictions were over Postal Service regulations, ten (10) years disqualifying time. (Wolski's deposition, page # 23, line 12, and page 25 line 13) Wolski testified this note was based "solely" on his recollection of his criminal history and his comment during the Redress Hearing. (Wolski's deposition, page #29, lines 20, 21, 22 and 23)
As originally enacted, Title VII of the Civil Rights Act of 1964, section 710, 78 Stat. 253, authorized only a private right of action against employers. See generally General Tel. Co.

of the Northwest, Inc. v. EEOC, 446 U.S. 318, 325-326 (1980). In 1991 Congress enacted 42 U.S.C. section 1981a (a)(1), which made compensatory and punitive damages available to a "complaining party" in a Title VII suit. Under Title VII as originally enacted, the EEOC's powers were limited to investigation and conciliation, and Congress relied exclusively on private parties' suits for enforcement. The EEOC authorized the Postal Service to act as an agency, under 717, now 2000e-16a(1)

On February 18, 1999 the petitioner received a "one-on-one" interview for a carrier position with the Postal Service. The respondent stated reason on this interview form (February 1999) was his criminal record and unemployed from 1990 to 1997 (Wolski initials). The petitioner contacted the postal service EEO office and alleged race, color and sex discrimination and ADEA. The EEO Counselor contacted the petitioner and offered to resolve his complaint under its ADR, Alternative Dispute Resolution Program. The Postal Service through its conciliation efforts to resolve the dispute offered the Alternate Dispute Resolution. The parties agreed to mediate signed an agreement that nothing said or done during this mediation would be cited. The respondent offered a settlement agreement.

This case involves a retaliation claim and an Alternate Dispute Resolution settlement agreement brought by the Petitioner. Title VII of the Civil Rights Act of 1964 expressly encourage the settlement of employment discrimination disputes and the use of arbitration and other forms of alternate dispute resolution without litigation. see Ford Motor Co. v. EEOC, 458 U. S. at 364-365. Courts have consistently encouraged the settlement of discrimination claims and have upheld those settlements when challenged. see, e.g. Occidental Life Insurance Co. v. Equal Employment Opportunity Comm., 432 U. S. 355 (1977); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). Section 717 of Title

VII of the Civil Rights Act of 1964 and 29 C.F.R. section 1614.603. The EEOC regulation effective November 9, 1999, 29 C.F.R. section 1614.105(a). Aggrieved person must contact a Counselor prior to filing a complaint in order to try to informally resolve the matter. 29 C. F. R. section 1614.105(b)(2). The Agency agreed to offer petitioner the ADR, 29 C.F.R. section 1614. 108(b). Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints.

The Postal Service EEO Counselor sent the petitioner a letter, March 22, 1999, explaining the REDRESS program, (postal service's redress, stand for Resolve Employment Disputes, Reach Equitable Solutions Swiftly). The petitioner, wanting a job, accepted the offer and a Redress meeting was scheduled for April 23, 1999. The mediation lasted approximately six (6) hours and during the meeting the respondent and petitioner discussed his past criminal record and his work history at great length. At the end of the mediation the parties did not reach an agreement, the petitioner testified that he "did not trust" Wolski and did not sign the settlement offer during the mediation. (Bell's deposition, page # 84, line 5) The meeting ended with no settlement agreement. A few days later the Counselor communicated with the petitioner and respondent (another postal manager), she sent the petitioner a letter reiterating that he would have to take another drug test and another police check. May 7, 1999 the petitioner and respondent entered into a conciliation settlement agreement. 29 C.F.R. section 1614.603- Voluntary settlement attempts, each agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including pre-complaint counseling stage.

The settlement agreement states: As a complete and final settlement of the subject matter, and without prejudice to the parties in any other case, and with the understanding

that it will not be cited in other proceedings, by the counselee, the counselee's representative (if any), and /or the union, the following resolution has been entered into by the parties. It is mutually agreed between the parties that this matter be resolved as follows: The Counselee's name and score of 77.6 will be restored to the carrier's register and the Counselee will be considered for employment when his name reaches the register for Area for (4). If the Counseelee's score is reached on the hiring register for other positions prior to being called off the carrier's register, he will be considered for those positions where his score has been reached. The Counsellee understands that when he receives a call-in notice he must successfully complete all the pre-hire requisites, which includes, but not limited to, drug screening, medical assessment, police check, and other pre-employment screening, and all results meet our pre-hire requirements. The Counselee understands that it will be his responsibility to obtain the necessary paperwork, which may be needed at the hiring interview for clarification purposes. There are no other terms or conditions of this agreement which are not expressly contained her in and none will be implied. There will be no back pay paid. There will be no attorney fees paid. END OF STATEMENT. Note: This settlement is being offered again per the parties' request. This case met at the mediation table and no agreement was reached. As a result communications continued later and the settlement is being presented for all parties to review and sign. On page #3, it states: This agreement constitutes a full and final settlement of all issues arising out of the subject matter. Management agrees to the contents of this resolution solely in an effort to resolve the counselee's allegation(s), and this agreement should not be construed as an admission of discrimination or wrongdoing on the part of any official of the U.S. Postal Service.

June 1999 the Respondent sent the Petitioner a call-in notice for employment and a new application to be completed by July 16, 1999. The Petitioner completed the new application,

a police check form, a new driver's license form, new job verification and took another drug test. October 1, 1999 the respondent sent the petitioner another call-in notice, this time a one-on-one interview with a postmaster, scheduled for October 14, 1999. The petitioner arrived for the interview, it lasted approximately 45 minutes. During the interview the postmaster asked the petitioner a range of question and the postmaster wrote his answers down. The Postmaster reviewed his application; the petitioner checked the yes box (for number 7a, conviction of a crime) and listed all of his criminal history, in section F of the application. The Postmaster check this section, listing all of his relatives (his wife, and sister-in-laws, employed with the postal service), in the same section F. Nothing was mentioned about his 16 to 24 years old criminal record (on page#4 of 4 of the application). The Postmaster, nevertheless, gave the petitioner an overall rating of excellent, he told petitioner that he had two vacancies in his Algonquin post office and offered the petitioner a job in his office. The Postmaster explained the job to petitioner, the location, the pay, his position (a ptf, part-time flexible), the hours and direction to his office from the petitioner's home and gave him his business card if he had any problems. The postmaster certified the petitioner was personal suitable and met eligibility requirements for the position and completed all of the necessary paperwork for hire, i.e. W-4, driver license, his application, job verification, police check, drug test and the I-9 form certifying the petitioner began work on October 14,1999. On the I- 9 form Mr. Clark certified that he was an Authorized Representative of the Postal Service. Wolski testified "The postmasters, no, they do the same thing. They either - they interview the person, and then they either select or they don't select that person." (Wolski's deposition, pages #6, lines 3, 4, and 5 and page # 7, line 12) Wolski is not allowed to modify the plain meaning of his deposition testimony. see Piscione v. Ernst & Young, L. L. P., 171 F. 3d 527, 532 (7th Cir. 1999) The record reveals there were (21) twenty-one carrier positions from this interview.

An Employer within the meaning of Title VII. An "Employer" includes "a person engaged in a industry affecting commerce who has fifteen or more employees and any agent of such person." 42 U.S.C. section 2000e(b) (emphasis added). An individual qualifies as an "employer" under Title VII if he or she serves as a supervisory position and exercises significant control over the plaintiff's (in this case applicant's) hiring, firing or conditions of employment. see York v. Tennessee Crushed Stone Ass'n, 684 F. 2d 360, 362 (6th Cir. 1982) (dictum); Tafoya v. Adams, 612 F. Supp. 1097, 1104 (D. Colo. 1985) aff'd, 816 F. 2d 555 (10th Cir.), cert. denied,__U. S.__, 108 S. Ct. 152, 98 L. Ed. 2d 108, (1987); Duva v. Bridgeport Textron, 632 F. Supp. 880, 882 (E.D. Pa. 1985) see also, Hamilton v. Rodgers, 791 F. 2d 439, 442 (5th Cir. 1986).

Afterwards, the hiring coordinator, Mark Wolski, the individual whom the charge was filed against and the one who offered the settlement agreement during the Redress, realized that the postmaster had offered the petitioner a job and completed the paperwork, changed the postmaster's yes (for hire) to no (not hire). Wolski also made a statement on this interview form as to his reasons for denying the petitioner employment. It states: Nonselect- Poor w/h - disclosed non-chalance about Assault/Battery conviction during Redress Hearing. "Gotta beat your wife to keep her in line" with his initials. Wolski testified "Okay. We use this space on the form for any type of information that we might need. In this case I used it to make a note as to why I was overturning Mr. Kent's decision — or Mr. Clarkk's decision. (Wolski deposition, page # 12 lines 7,8, 9 and 19) Petitioner testified that this statement is a lie. (Bell's deposition, page # 47 lines 23 and 24 and page # 48 lines 4, 5, 6, 7, 8, 9 and 10) Also during Wolski deposition he was asked, Question: Is this note based solely on your recollection of his criminal history and his comment during the redress hearing?

Answer- Yes, it is, yeah. (Wolski's deposition, page #29, lines 20, 21, 22 and 23) The conflict between these two positions on a summary judgment motion or review of a motion cannot be resolved without deciding which side to believe. On summary judgment, a court can neither make a credibility determination nor choose between competing inferences. Anderson, 477 U.S. at 255, 106, S. Ct. at 2513; Wilson v. Williams, No. 92-3708, slip op. at 5 (7th Cir. June 29, 1993); Cameron v. Frances Slocum Bank & Trust Co., 824 F. 2d 561, 562 (7th Cir. 1987) These are functions for a jury

The nonmoving party's own affidavit or deposition will constitute affirmative evidence to defeat a summary judgment motion, Wilson, slip op. at 6; Jackson v. Duckworth, 955 F. 2d 21, 22 (7th Cir. 1992), even if it includes only bare denials. Schere v. Rockwell International Corp., 975 F. 2d 356, 360 (7th Cir. 1992) (citing Gatlin v. Jewel Food Stores, 699 F. Supp. 1266, 1268 (N. D. Ill. 1988)).

Wolski's note remained apart of the petitioner's pre-employment file and was viewed each time, by Postal Officials. When he received call-in-notices after the October 14,1999 interview, December 1999, January 2000 and March 2000, he was denied each time. Wolski testified that his note just becomes part of Mr. Bell's pre-employment file or pre-screening file, as we call it." (Wolski's deposition, page # 30, lines 7 and 8) see Charlton v. Paramus Bd. of Educ., 25 F. 3d 194, 200 (3rd Cir.) (Title VII), cert. denied, 115 S. Ct. 590 (1994); Dunlop v. Carriage Carpet Co., 548 F. 2d 139,142-47 (6th Cir. 1977) (FLSA) (quoting) Charlton, 25 F.3d at 200 Thus, concerned that a narrow interpretation of the anti-retaliation provision of Title VII and its counterparts would leave a significant gap in the statutory protection that Congress intended, the majority of courts have eschewed a construction that effectively would, for example, "allow an employer to discriminate against and 'black list' a former employee as long as the employer can successfully keep the former employee form getting a job and thereby becoming

technically 'employed by an employer' (in this case an applicant/petitioner) Dunlop, 548 F. 2d at 147. "This would be to reward the very conduct the Act sought to preclude." Id.
The Petitioner would have been hired and working as a Carrier for the United States Postal Service "but for" Wolski's statement on his interview form basing his decision on a lie and allegedly something said or done during the Redress Hearing, petitioner's protected activity. see Dunn v. Nordstrom Inc., 260 F. 3d 778, 784 (7th Cir. 2001); Basith v. Cook County, 241 F. 3d 919, 933 (7th Cir. 2001); Cullom v. Brown, 209 F. 3d 1035, 1040 (7th Cir. 2000); King v. Preferred Technical Group, 166 F. 3d 887, 892 (7th Cir. 1999).

The District Court and the Court of Appeals stated this statement does not constitute direct evidence of retaliation. Petitioner argued to both Courts that it does, first, the fact that the Respondent had already "tacitly conceded" to the petitioner's allegation in his Complaint and his prima facie case of Retaliation, and second, respondent's statement clearly denies the petitioner employment and its based allegedly on something he said or done during the Redress Hearing, petitioner's protected activity.

Section 704(a) of Title VII makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment because he has opposed any practice made an unlawful employment practice by Title VII, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Title VII." The clause at the heart of this case is the "participation clause". Because of the petitioner's participation in the Redress Hearing the respondent based its decision, not to hire petitioner, solely on something allegedly said or done during the Redress Hearing, which is a violation his rights and his protected activity under the provisions of section 704(a) of Title VII.

The respondent in his reply brief remained silent to the petitioner's prima facie case for retaliation. The District Court granted the respondent's motion for summary judgment and the Court of Appeals affirmed.

The District Court granted summary judgment to the respondent, as a matter of law, was inappropriate. As a matter of law the petitioner's allegation of unlawful retaliation was uncontested. see Merritt, 120 F. 3d at 1189; Cater v. Three Spring Residential Treatment, 132 F. 3d 635, 642 (11th Cir. 1998). Therefore, "when there is direct evidence that the defendant acted with a discriminatory, in this case retaliatory, motive, and the trier of fact accepts this testimony, the ultimate issue of discrimination (retaliation) is proven. see Thompkins, 752 F.2d at 563 (quoting Bell v. Birmingham Linen Serv., 715 F. 2d 1552, 1556 (11th Cir. 1983).

REASONS FOR GRANTING THE PETITION

The Petitioner in his response to the Respondent's motion for summary judgment cited settled case law precedents that a complainant need not file another charge with the EEO office of a claim growing out of a discrimination or ADEA claim. The District Court recognized its error of dismissing petitioner's retaliation claim prematurely in its December 19, 2001 Opinion. The District Court cited the cases from the Seventh Circuit. see McKenzie v. Illinois Dep't of Transp., 92 F. 3d 473, 482-83 (7th Cir. 1996); Rennie v. Garrett, 896 F. 2d 1057, 1062 (7th Cir. 1990); Malhotra v. Cotter & Co., 885, F.2d 1305, 1312 (7th Cir. 1989). The District Court also acknowledged the fact that the Respondent had "tacitly conceded" by not responding to the Petitioner's prima facie case of retaliation. Petitioner cited a prima facie case in his Complaint and in his response to the summary judgment motion. The Respondent remained silent in the face of the presumption and this Court stated a verdict must be entered in favor of the plaintiff when this happens. The District Court instead ordered the parties for a status hearing for a "possible reinstatement" of the Retaliation Claim. The Petitioner argued in his response that the District Court's Opinion was erroneous and conflicts with the decisions of this Court. Reinstating the petitioner's retaliation claim offered the respondent another bite of the apple and a chance to amend his affirmative defense, to include a defense for the retaliation claim and to file another motion on the summary judgment on the retaliation claim. The Respondent had an opportunity to address the retaliation claim and he remained silent, in his October 2001 reply brief. The District Court had everything it needed to enter a verdict in the petitioner's favor, i.e. Respondent's motion for summary judgment, the Petitioner's response to the motion, cited case laws where the District Court erred in dismissing his retaliation claim, petitioner's response citing a prima facie case, petitioner's Complaint (citing a prima facie case of retaliation), and the Respondent's reply brief and the fact, Respondent remained silent.

The District Court granting the respondent's motion for summary judgment and the Court of Appeals affirmed conflicts with decisions from the Supreme Court holding that "If an employer remains silent when faced with a presumption, a verdict must be rendered in favor of the Plaintiff." The Supreme Court in St. Mary's Honor Center v. Hicks, footnote # 3, "If the finder of fact answers affirmatively - if it finds that the prima facie case is supported by a preponderance of the evidence - it must find the existence of the presumed fact of unlawful discrimination and must, therefore, render a verdict for the plaintiff. see Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254, and n. 7 (1981); F. James & G. Hazard, Civil Procedure 7. 9, p. 327 (3d ed. 1985); 1 D. Louisell & C. Mueller, Federal Evidence 70, pp. 568 - (1977). Thus, the effect of failing to produce evidence to rebut the McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973), presumption is not felt until the prima facie case has been established, either as a matter of law (because the plaintiff's facts are uncontested) or by the fact finder's determination that the plaintiff's facts are supported by a preponderance of the evidence." The District Court acknowledged these facts in it December 19, 2001 Opinion and failed to follow these settled case law precedent. (District Court Opinion, December 19, 2001)

The petitioner cited these settled case law precedents to the District Court, in his response to the Respondent's summary judgment motion, September 2001, which was ignored and also to the Court of Appeals, again ignored. Both Courts proceeded with the motion for summary judgment and focused on the elements of the prima facie case for retaliation and ignored this fact. As a matter of law, because the plaintiff's facts were uncontested, had established a prima facie case of retaliation and the respondent had already admitted to the fact of unlawful retaliation, by not

responding to it in his reply brief. As a result of this conflict, the relief available to the Petitioner depends on the Supreme Courts superior power resolve to the conflict decribed in settled case law precedent from this Court. The conflict in the lower Courts is squarely presented by this case, and further review is therefore warranted.

1. The lower courts held that the petitioner did not have direct evidence on his retaliation claim and therefore must proceed using the McDonnell Douglas framework. The District Court and Court of Appeals holding on this point ignores this Court's teaching in St. Mary's Honor Center v. Hicks and Texas Dept. of Community Affairs v. Burdine. The petitioner argued the McDonnell Douglas framework did not apply in his case because the respondent had admitted to his entire allegation in his Complaint and Respondent not responding had established a prima facie case of retaliation, again. Wolsk's statement on his interview form meant that Petitioner was denied employment because of his participation in the Redress Hearing. see Hoffman v. MCA, In., 144 F. 3d 1117, 1122 (7th Cir. 1998) and Stopka v. Alliance of Am. Insurers, 141 F. 3d 681, 688 (7th Cir. 1998)

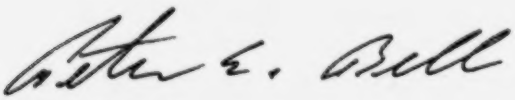
2. As a matter of law the respondent's summary judgment motion should have been denied by both courts, when viewing the settled case law precedent of this Court. The legal anyalsis was incomplete, as a matter of law, (because petitioner's facts were uncontested) and the existence of the presumed fact of unlawful retaliation was before the District Court at the time of its December 19, 2001 Opinion. Petitioner argued this to the Court of Appeals reviewing the summary judgment motion and a verdict should have been rendered in the Petitioner's favor.

3. The Court of Appeals for the Seventh Circuit conflicts with decisions in its own settled case laws and with those of other Circuits. Petitioner and Respondent entered into a voluntary Alternate Dispute Resolution. Petitioner was denied employment because of something he allegedly said or done during the Redress Hearing, his protected activity, in violation of the Act. section 704a and section 703(a)(1) of the Act 490 U.S. 228, (No. 87 - 1167) (1989); Klein v. Trustees of Indiana Univ., 766 F. 2d 275, 280 (7th Cir. 1985); Kunn v. Nordstrom Inc., 266 F. 3d 778, (7th Cir. 2001); Bastin v. Cook County, 241 F. 3d 919, 933 (7th Cir. 2001); Firros v. Texas Dept. of Health, 274 F. 3d 187, 191 (5th Cir. 2001); Penninton v. City of Huntsville, 261 F. 3d 1262, 1265-66, (11th Cir. 2001); Bass v. Broad of County Commissioners, 256 F. 3d 1095, 1119 (11th Cir. 2001)

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted.



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APPENDIX A

UNITED STATES COURT OF COURT OF
SEVENTH CIRCUIT

No. 02 - 2732

PETER E. BELL, PLAINTIFF-APPELLANT

v.

JOHN E. POTTER, DEFENDANT-APPELLEE

Argued November 20, 2002
Decided November 20, 2002

Before COFFEY, EASTERBROOK and MANION, Circuit Judges, and REINHARD, United States District Judge for the Northern District of Illinois, sitting by designation.

Affirmed by unpublished Opinion. Ten (10) Copies provided.

AMENDED APPENDIX A-1

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN ILLINOIS DISTRICT
WESTERN DIVISION

Civil Action No. 00 - C - 50164

PETER E. BELL, PLAINTIFF
v.
JOHN E. POTTER, DEFENDANT

Entered January 4, 2002

MEMORANDUM OPINION AND ORDER

For the reasons stated on the reverse, the court hereby reinstates plaintiff's claim of retaliation. Defendant is given leave to file another motion for summary judgment, limited to this claim. If the discovery has been completed on this claim, defendant is given thirty days from today's date to file such a motion for summary judgment, plaintiff is given thirty days after that to file his response, if any, and defendant is given ten days after that to file his reply, if any. Otherwise, if discovery has not been completed on the retaliation claim, the parties are to contact Judge Reinhard's minute clerk to have this case placed on the court's motion call at 9:oo a. m. on Wednesday, Jan. 23, 2002 for further scheduling.

ORDER

In its previous Memorandum Opinion and Order, dated December 19, 2001 (Doc. No. 26), the court discussed the possible reinstatement of Bell's retaliation claim. Both Bell and counsel for the Postmaster General have since appeared

before the court regarding this matter. Having considered the issue further, the court orders the reinstatement of the retaliation claim.

To be clear, Bell's retaliation claim is essentially that the U.S. Postal Service ("USPS") refused to hire him on separate occasions, after the parties signed a Settlement Agreement, in retaliation for filing his original informal complaint with the USPS's EEO counselor. When the court previously dismissed this claim, it did so because Bell had not exhausted his administrative remedies with respect to this claim. A line of cases, however, have carved out an exception to the administrative exhaustion requirement for a claim of retaliation growing out of an earlier charge of discrimination. In particular, these cases generally hold that a plaintiff need not file a separate, second administrative charge of discrimination to assert a claim that the employer has retaliated against him for filing a previous charge of discrimination. In that situation, the retaliation claim is seen as reasonably related to the original charge of discrimination, making a "double filing" unnecessary. See McKenzie v. Illinois Dep't of Transp., 92 F. 3d 473, 482-83 (7th Cir. 1996); Rennie v. Garrett, 896 F. 2d 1057, 1062 (7th Cir. 1990); Malhotra v. Cotter & Co., 885 F. 2d 1305, 1312 (7th Cir. 1989).

Counsel for the Postmaster General argued this exception to the exhaustion requirement should not apply in this case because, although Bell initiated what is known as "pre-complaint counseling," see 29 C.F.R. section 1614.105, he never filed a formal complaint of discrimination and followed through with the administrative process. In the court's view, this distinction is of little practical significance. It would make no sense to afford protection against retaliation to plaintiffs who filed a formal complaint of

discrimination but not those who stopped at the informal complaint stage - either way, the plaintiff is still (allegedly) being retaliated against for engaging in the administrative process under Title VII.

For the reasons stated above, the court reinstates Bell's claim of retaliation.

/s/ PHILIP G. REINHARD
PHILIP G. REINHARD
DISTRICT JUDGE

Rockford, Illinois
December 19, 2001

AMENDED APPENDIX A

UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

PETER E. BELL, PLAINTIFF-APPELLANT

v.

JOHN E. POTTER, DEFENDANT-APPELLEE

Submitted November 20, 2002
Decided November 20, 2002

Before COFFEY, EASTERBROOK and MANION, Circuit Judges, and REINHARD, United States District Judge for the Northern District of Illinois.

ORDER

Peter E. Bell, appeals the grant of summary judgment for the United States Postal Service on his claim that he was refused employment in retaliation for filing an informal discrimination complaint with the Postal Service after it rejected his previous job application. We affirm.

In February 1999 Bell, who is African American, applied for work as a letter carrier, and when regional hiring official Mark Wolski turned him down, Bell filed and informal complaint with the Postal Service accusing Wolski of racial discrimination. After in-house mediation, the parties reached a settlement providing that Bell's name would remain on the list of carrier candidates to be called in for future interviews. Bell was called in for four interviews

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After and examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P 34 (a) (2).

during the next several months, and afterward Wolski evaluated him against two other individuals pursuant to the Postal Service's practice of choosing the most qualified of three candidates. Selection factors include the applicant's civil service exam test score, work experience, and criminal history. Wolski ultimately eliminated Bell, explaining later that he considered the other two candidates superior because of Bell's extensive criminal history and flippant attitude about it, his extended period of unemployment, and comments he had made about women during the mediation of his informal complaint.

Bell argues here that the district court erred in concluding that he failed to offer any evidence that Wolski denied his second application to retaliate for his filing of the informal complaint. A plaintiff can prove retaliation either using direct evidence or under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See *Stone v. City of Indianapolis*, 281 F. 3d 640, 644 (7th Cir. 2000). To prove retaliation using direct evidence, a plaintiff must show that he participated in a protected activity and as a consequence suffered an adverse job action. *Stone*, 281 F. 3d at 644. Under *McDonnell Douglas* Bell must show that after filing the informal complaint he, and not any similarly situated applicant who did not file a complaint, was denied employment. *Id.*

Bell did not present direct evidence of retaliation. What he describes as direct evidence is a comment that Wolski wrote on Bell's interview form: "NONSELECT- POOR [work history] - DISCLOSED NON-CHALANCE [sic] ABOUT ASSUAL/BATTERY [sic] CONVICTION DURING [mediation] HEARING. 'GOTTA BEAT YOUR WIFE TO KEEP HER IN LINE." Bell claims that, since Wolski learned this information during the informal complaint hearing it is direct evidence that Wolski retaliated against him for filing the complaint. We disagree. In the context of Title VII, we have held that direct evidence "essentially requires an

admission by the decision-maker that his actions were based upon the prohibited animus." *Radue v. Kimberly-Clark Corp.*, 219 F. 3d 612, 616 (7th Cir. 2000). Wolski's statement does not contain any admission tat he denied Bell employment because he had previously filed an informal complaint. Wolski's comment addresses Bell's work history, criminal background, and apparent attitude toward women.

Bell incorrectly relies on two Eleventh Circuit cases in characterizing Wolski's comment as direct evidence. See *Merritt v. Dillard Paper Co.*, 120 F. 3d 1181, 1189 (11th Cir. 1997) (direct evidence of retaliatory discharge when employer stated, "Your deposition was the most damning to [employer's defense to a Title VII] case, and you no longer have a place here at [the company]"); *Tompkins v. Morris Brown Coll.*, 725 F. 2d 561, 563 (11th Cir. 1985) (direct evidence of sex discrimination when employer stated that he saw no reason for a woman to have a second job and that plaintiff's work schedule could not be changed because the men in her department had families and needs that the plaintiff did not have). These cases contain comments that clearly demonstrate the discriminatory purpose of the employer, unlike Wolski's comments that refer to non-discriminatory hiring consideration.

Because Bell did not have direct evidence that he was not hired because he filed an informal complaint, he was required to proceed under the *McDonnell Douglas* framework. To do so, Bell must have shown that after filing his informal complaint, he and not any similarly situated employee who did not use the complaint process, was subjected to an adverse employment action. *Stone, 281* F. 3d at 644. Bell did not identify any similarly situated applicants who were hired by the Postal Service. The only comparison of potential postal employees provided by Bell were applicants and their test score, but this was not among the reasons that the Postal Service articulated for not hiring Bell. Bell provided no evidence of successful applicants with a

similar criminal history and employment history. Therefore, the district court correctly granted summary judgment for the Postal Service.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN ILLINOIS DISTRICT
WESTERN DIVISION

Civil Action No. 00 - C - 50164
PETER E. BELL, PLAINTIFF
v.

JOHN E. POTTER, DEFENDANT

Filed March 1, 2002
Entered: May 21 2002

MEMORANDUM OPINION AND ORDER

For the reasons stated on the reverse Memorandum Opinion and Order, defendant's motion for summary judgment as to plaintiff's retaliation claim is granted. The court hereby dismisses plaintiff's retaliation claim, and reaffirms its previous orders (Doc Nos. 12 & 26)

ON THE REVERSE

Plaintiff, Peter E. Bell, proceeds pro se in his complaint against defendant, John R. Potter, Postmaster General of the United States ("Postmaster General"), for alleged violations of Title VII of the Civil Rights Act of 1964, 42 U. S. C. sec. 2000e- 3, 2000e- 16, and the Age Discrimination in Employment Act, 29 U.S.C. section 633a, Jurisdiction and venue are proper in this district and division based on 42 U.S.C. section 2000e- 16(c), 2000e- 5 (f)(3). Before the court is the Postmaster General's motion for summary judgment on Bell's retaliation claim, filed pursuant to Fed. R. Civ. P. 56.

Because this claim was originally dismissed but later reinstated, the court gave the parties an opportunity to conduct any further discovery on it and gave the Postmaster General leave to file the present motion. For brevity's sake, the court will assume familiarity with its previous memorandum opinion in this case, see Bell v. Potter, No. oo C 50164, 2001 WL 1636888 (N. D. Ill. Dec. 20, 2002), and will recite only those facts necessary to its analysis of the retaliation claim. Bell essentially alleges Mark Wolski, who is in charge of hiring for the U.S. Postal Service ("USPS") in the northern Illinois area, refused to hire him in retaliation for previously filing a charge an informal complaint of discrimination (or request for "pre-complaint counseling as it is called) against Wolski with the USPS's equal employment opportunity office. To prove this claim Bell may proceed in one of the two ways, the first of which is to present direct evidence that his protected expression-i.e., filing an informal complaint of discrimination - caused Wolski not to hire him. See Stone v. City of Indianapolis Pub. Util. Div., 281 F. 3d 640, 643, 644 (7th Cir. 2002). Such direct evidence must establish the causal relationship between Bell's protected activity and the adverse employment action "without resort to inferences from circumstantial evidence." Id. At 644. Bell believes he has just this sort of direct evidence in this case. After he filed his informal complaint of discrimination, Bell participated in the USPS's mediation or alternative dispute resolution program (known by the acronym "REDRESS") in an attempt to settle the complaint. During the REDRESS hearing Bell discussed his criminal record and work history with Wolski. And when Wolski decided not hire Bell some five to six months later, he wrote down on Bell's interview form the following comments: "Nonselect- poor [work history] - disclosed non-chalance [sic] about assault/battery [sic] conviction during the REDRESS Hearing. 'Gotta beat your wife to keep her in line." Besides vehemently denying he ever made such a statement about his wife, Bell argues these comments "correlate[]easily to the complained of

retaliation" and thus Constitute direct evidence of Wolski's retaliatory attitude. In the Courts opinion, they do not. It is true that Wolski's comments about poor work history and prior criminal convictions, as well as the statement Wolski attributed to bell regarding his wife, were directly related to Wolski's decision not to hire Bell, but this misses the point. Even assuming all of the statements were based on what Wolski recalled of the REDRESS hearing, none of them "can be interpreted as an acknowledgement of "Wolski's intent to retaliate against Bell for filing the informal complaint against him or engaging in other protected activity. Pitasi v. Gartner Group, Inc., 184 F. 3d 7089, 714, (7th Cir. 1999). Put another way, the fact that Wolski used information he allegedly obtained during the REDRESS hearing to deny employment to Bell does not show, at least not "without reliance on inference or presumption," id. Wolski refused to hire Bell because Bell participated in the REDRESS hearing itself or, even more generally, because he complained about what he perceived was unlawful discrimination. To illustrate the difference, suppose Wolski wrote down something like, "Nonselect - filed informal complaint, "or, "Nonselect - requested REDRESS hearing." These examples are more akin to direct evidence of retaliation and more closely analogous to the statement discussed in Merritt v. Dillard Paper Co., 120 F. 3d 1181, (11th Cir. 1997), the case Bell relies on for his direct evidence theory. See id. At 1190 (holding that employer's remark to plaintiff - "your deposition was the most damning to Dillard's case, and you no longer have a place here at Dillard Paper Company" - constituted direct evidence of employer's retaliatory intent to fire employee for giving a deposition in a coworker's discrimination caseagainst the employer, whichis considered participation in protected activity.) As it is, the only thing Wolski's actual comments on Bell's interview form prove directly is that Wolski was not willing to hire someone who he thought had a spotty employment record and a casual attitude about his criminal past. But in no event does the court believe Wolski's comments can be considered direct

evidence of retaliation. This means Bell must proceed instead under the indirect or McDonnell Douglas burden-shifting method to prove his retaliation claim. Establishing a prima facie case of unlawful retaliation in this manner requires Bell to demonstrate, among other things, that he was treated less favorably than similarly situated applicants who did not engage in statutorily protected activity. See Hilt-Dyson v. City of Chicago, 282 F. 3d 456, 465 (7th Cir. 2002); Stone, 281 F. 3d at 644. And it is here that Bell's claim falters. Mot importantly, the record contains absolutely no evidence of even one other USPS applicant who had a criminal record and employment history comparable to Bell's, who did not file a request for pre-complaint consunseling or otherwise complain about discrimination, and who was nevertheless hire. The closest Bell ever comes in this respect is to point out evidence that all of the individuals hired instead of him had test scores lower than his. It appears the reason Bell harps on this point is that he is still working on the mistaken assumption that, once the parties signed the settlement agreement, the Postmaster General was required to hire him as soon as his name and test score were reached on the hiring register, without regard to his prior criminal record and employment history. As the court explained in its previous opinion, this was not the case. To repeat, the settlement agreement did not excuse Bell from the Postmaster General "one in three" selection process, which compares each applicant to two other applicants based on various factors, including test scores (the three applicants to be compared are actually chosen in "score order"), past employment record, whether family members are employed with the USPS, and criminal history. Under this "one in three" selection process, the job goes to the applicant who is most qualified overall out of the three, not simply the one with the best test score. An d because Bell has produced no evidence at all about the qualifications of the individuals he was compared with and who were hired instead of him, other than their test scores, or whether they ever engaged in protected activities, his

retaliation claim must fail. See id. (failure to satisfy any element of the prima facie case is fatal to retaliation claim). For the reasons stated above, the Postmaster General's motion for summary judgment on Bell's retaliation claim is granted. This case is hereby dismissed in its entirety.

Footnote: Alternatively Bell claims Wolski testified in his deposition that the "one in three" selection process is done before the applicant is called in for an interview. The desired implicationfromthis seems to be that, because he had been called in for an interview, Bell must have already passed the "one in three" selection process, so it was improper for Wolski to rely on Bell's criminal record and employment his tory in refusing to hire him because that is only considered at the "one in three" selection stage. Whatever merits this theory might have, it is completely unsupported in the record- none of the portions of Wolski's deposition Bell cites can be read to mean that the "one in three" selection process is performed before an interview is conducted. (LR 56.1 (a) Pl. Resp. p. 24)

The case is dismissed in its entirety.

/s/ PHILIP G. REINHARD
PHILIP G. REINHARD
DISTRICT JUDGE

Rockford, Illinois,
May 21 2002

APPENDIX C

IN THE UNIED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Civil Action No. 00- C-50164

PETER E. BELL, PLAINTIFF

v.

JOHN E. POTTER, POSTMASTER GENERAL
OF THE UNITED STATES POSTAL SERVICE

Filed August 13, 2001
Entered December 19, 2001

MEMORANDUM OPINION AND ORDER

For the reasons stated on the attached Memorandum Opinion and Order, defendant's motion for summary judgment is granted. Plaintiff's claim based on the breach of the Settlement Agreement is dismissed with prejudice. Plaintiff and counsel of defendant are hereby ordered to appear at a status conference on Wednesday, Jan. 2, 2002 at 9:00 a.m. to discuss the possible reinstatement of plaintiff's retaliation claim, as explained on pages 14 -15 of the attached Memorandum Opinion and Order.

INTRODUCTION

Plaintiff, Peter E. Bell, proceeds pro se in his complaint against defendant, John E. Potter, Postmaster General of the Untied States ("Postmaster General"), in which he alleges various instances of prohibited discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C sections 2000e-3, 2000-16 ("Title VII"), and the Age Discrimination in Employment Act, 29 U.S.C section 633a ("ADEA"). Early on in the case, the Postmaster General filed a motion to dismiss or, in the alternative, for summary judgement, as to all aspects of Bell's complaint. The court granted in part and denied in part that motion, essentially dismissing all of Bell's claims except one:

II. BACKGROUND

In early 1999, Bell applied for, but did not receive, a job with the U.S. Postal Service ("USPS") in Carol Stream, Illinois. (Compl. Par. 4, 8, p.3) Believing Mark Wolski, USPS's hiring coordinator for the Northern Illinois District, did not hire him because of his race (African-American), color (black), sex (male), and age (forty-two years old), Bell filed an informal complaint of discrimination against Wolski with the USPS in March 1999, initiating what is referred to as "pre complaint counseling." See 29 C.F.R.section 1614.105. (Compl. Par. 5, 6, 9, p. 3; LR 56.1 (a) section 4) The parties then engaged in private mediation, leading to a proposed Settlement Agreement. (LR56. (a) Par. 5, 6) Bell rejected the proposal at first, but later decided to sign the agreement without any changes having been made to it. (Id. Par. 7, 8) The agreement is dated May 7, 1999, and is signed by Bell, Bell's wife as his representative, and a USPS representative. (Id.p 9) Under the Settlement Agreement, the USPS agreed to restore Bell's name and test score to "the

Carrier's register." (Id.) The agreement also required the USPS to "consider [] [Bell] for employment when his name reaches the register for Area four (4)." (Id.) Other relevant portions of the Settlement Agreement read as follows: The Counselee [Bell] understands that when he receives a call-in notice he must successfully complete all the pre-hire requisites which includes [sic], but [are] not limited to, drug screening, medical assessment, police check, and other pre-employment screening, and all results meet our [the USPS's] pre-hire requirements. There are no other terms or conditions of this agreement, which are not expressly contained herein, and non will be implied. (Id.; Def. Exh., Bell dep. Exh. A. "Settlement Agreement Form," pp. 1, 2) After the parties signed the agreement, the USPS restored Bell's name and score to the carrier's register for Area Four. (LR 56.1 (a) Par. 10) Once his name was reached on that register, the USPS sent Bell four different "call-in notices," dated October 1, 1999, December 2, 1999, January 18, 2000, and February 29, 2000. (LR 56.1 (a) Par. 12; Def. Exh., Wolski dep. Exhs. 1, 5, 7 9) In a follow-up to the October 1999 call-in notice, Bell had an interview with Postmaster Kent Clark, who rated Bell as "excellent" and certified him as meeting the USPS's "personal suitability and eligibility requirements." (LR 56.1 (a) Pl. Resp. Par. 15, 16, 19; Pl. Exh. 2, Clark Dec. Par. 2) Bell Testified in his deposition that Postmaster Clark offered him a carrier position on the spot. (LR 56.1 (a) Par. 16) However, Clark himself has stated his role was simply to review the applications for accuracy; he had "absolutely no authority to hire city letter carriers" and it was the personnel department that was responsible for selecting and hiring applicants. (Pl. Exh. 2, Clark Dec. Par. 4, 10) As the hiring coordinator for the USPS's Northern Illinois District, Wolski was the final decision maker and selecting official for hiring the entry-level carrier position for which Bell applied. (LR 56.1 (a) Par. 14; (Def. Exh., Wolski dep. , p. 8) After Clark interviewed Bell, Wolski overrode Clark's determination that Bell met the "personal suitability

and eligilit requirements, " based on Bell's poor work history and criminal record, and also wrote down certain negative comments Bell allegedly made during the mediation about his prior convictions. (Def. , Bell dep. Exh. 5, Bates No. 115; Def. Exh., Wolski dep., pp. 7-9) In early December 1999 (around the same time he received the second call-in notice), Bell received a rejection letter from Wolski on the first call-in notice. (Compl. Par.10, p. 6) Dissatisfied with this, and having received no response from the second call-in notice by the end of December 1999, Bell wrote a letter to the USPS's Equal Employment Opportunity (EEO) Office. (Id. Par. 11, p.8) He essentially claimed that, by not hiring him, Wolski had breached the terms of the Settlement Agreement and retaliated against him for filing his inform complaint. (Court Doc. No. 8, Def. Mot. To Dismiss, Exh. 4) The EEO Office replied with its "Final Agency Decision," in which it cited Bell's four prior convictions for battery, unlawful use of a weapon, theft, and burglary, as well as his unemployment record for the preceding seven years, as grounds for affirming Wolski's decision not to hire Bell. (Compl. Exh. 1, p. 2) It thus concluded the USPS had complied with the Settlement Agreement. (Id.)

III. ANAYSIS

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c); Chavez v. Illinois State Police,251 F. 3d 612, 635 (7th Cir. 2001). To determine whether a genuine issue of material fact exists, the court views the evidence and draws all reasonable inferences in the light most favorable to the nonmoving party. See Chavez, 251 F. 3d at 635. However, only when a reasonable jury could find for the nonmoving party based on the record, as a whole will there be a "genuine issue for trial." See id.

Subject Matter Jurisdiction

In his motion for summary judgment, the Postmaster General renew his challenge to this court's subject matter jurisdiction over Bell's complaint and asks the court to reconsider its previous decision on this issue. He argues Title VII, and 42 U.S.C. sec. 2000e- 16 (c) in particular, does not confer jurisdiction of federal courts "to enforce settlement agreements reaches before the initiation of litigation." (Def. Memo., p. 9) Part of his argument also seems to be premised on the idea that, before Bell could file suit in federal court, 29 C.F.R. sec. 1615. 504 (b) required him to first appeal the "Final Agency Decision" to the EEOC. ThePostmaster General further claims this court's "prior decision rejecting this argument appears to be based on a misreading of the EEOC's reulations and dicta in a single appellate decision [, Saksenasingh v. Secretary of Educl., 126 F. 3d 347 (D.C. Cir. 1997),] that is contrary to the weight of authority." (Def. Memo., p. 10) The court respectfully disagrees with all of these points and believes it is the Postmaster General who has misread the statute and the regulations. To begin with, whether subject matter jurisdiction is proper in this case has nothing at all to do with the EEOC" regulation or the Sakenasingh case. Rather, jurisdiction is based purely on a straightforward application of sec. 2000e-16 (c). The first clause of this subsection specifically allows an individual to file a civil action in federal court "[w]ithin 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) . . . ." One of the agencies listed in subsection (a) is the USPS, 42 U.S.C. sec. 2000e-16 (a), and the "Final Agency Decision" the USPS's EEO Office sent Bell is, without a doubt, a "final action" within the meaning of sec. 2000e- 16 (c), see 29 C.F.R. sec. 1614.110 (b). Thus, jurisdiction is undeniably proper because Bell filed suit within ninety days from when he received the USPS's "Final

Agency Decision." An whatever the merits of the Postmaster General's argument about federal courts lacking jurisdiction to enforce "pre-litigation settlement agreements," it too is beside the point in this case because, once again, the USPS's EEO Office sent Bell a "Final Agency Decision." This "final action" discussed Bell's claim that the USPS breached the Settlement Agreement, and agreement that was (in the court's words from its previous order) reached under the auspices of the EEOC's administrative machinery i.e., during the processing of Bell's request for pre-complaint counseling under 29 C.F.R. sec. 1614. 105 in connection with what he believed to be discrimination prohibited by Title VII and the ADEA. And it is this final action that gives this court jurisdiction. In other words, it is not the (alleged) breach of the Settlement Agreement itself, but the USPS's "Final Agency Decision" that it did not breach the Settlement Agreement, that confers jurisdiction under the first clause of sec. 2000e-16 (c). The federal regulations further bear the court out on this point and, at the same time, dispel the Postmaster General's notion that a complainant must first appeal a final agency decision to the EEOC before suing in federal court. Though not a model of clarity, sec. 2000e-16 (c) contains four separate bases of subject matter jurisdiction, laid out more explicitly in 29 C.F.R. sec. 1614. 407, two of which are that a complainant may file a civil action in a U. S. District Court within ninety days of receipt of either "the final action on an individual . . .complaint if no appeal [to the EEOC] has been filed" or "the [EEOC]'s final decision on an appeal." See Id sec. 1614.407 (a), (c) (emphasis added). This is, after all, why the regulations also require a federal agency to include in its final action, and why the USPS included in its "Final Agency Decision" to Bell, notice of the complainant's right, upon receiving the final decision, to
appeal that decision to the EEOC or file suit in federal court. See Id sec. 1614.110 (b). (Compl. Exh. 1, p. 2) Thus, Bell did exactly as was his right after receiving the final decision from the USPS: rather than appeal to the EEOC, he instead

filed suit her. See Saksenasingh, 126 F. 3d at 350 (plaintiff not required, as part of exhausting administrative remedies, to appeal federal agency's final action to the EEOC before filing suit in federal court); 29 C.F.R. sec. 1614. 401 (a), (d), 1614. 504 (b) (stating that "complainant may appeal" final action to EEOC) (emphasis added).

B. Breach of the Settlement Agreement

With subject matter jurisdiction now secure, the court turns to Bell's claim that Wolski breached the Settlement Agreement. As it turns out, this dispute essentially boils down to a question about how to interpret the terms of that agreement. A settlement agreement is merely a contract between the parties to the litigation; as such, the formation, construction, and enforcement of a settlement agreement is governed by local contract law. See Abbott Labs. V. alpha Therapeutic Corp.,164 F. 3d 385, 387 (7th Cir. 1999); Carr v. Runyan, 89 F. 3d 327, 331 (7th Cir. 1996), cert. denied, 519 U. S. 1117 (1997). In Illinois, if the contract language is clear and unambiguous, the parties' intent must bust be ascertained exclusively from the plain language of the contract as a matter of law and extrinsic or parol evidence outside the "four corners" of the document may not be considered. See Much v. Pacific Mut. Life Ins. Co., 266 F. 3d 637, 643 (7th Cir. 2001) (applying Illinois law); Kaplan v. Shure Bros., Inc., 266 F. 3d 598, 604 (7th Cir. 2001) (same). The interpretation of a clear and unambiguous contract is normally a question of law that is suitable for summary judgment. See Geier v. Medtronic,Inc., 99 F. 3d 238, 244(7th Cir. 1996). Contract language will be found ambiguous only when it is reasonably susceptible to different constructions, not merely because the parties disagree as to its proper construction or application. See Kaplan, 266 F. 3d at 605. In the face of an unambiguous contract, any particular interpretation one of the parties may have had at the time contract was executed

is immaterial. See id. at 604. The Settlement Agreement between Bell and the USPS provided that Bell would be "considered for employment" once his name reached the carrier's register. It also required Bell to successfully complete and meet all of the USPS's "pre-hire requirements," including, "but not limited to , drug screening, medical assessment, police check, and other pre-employment screening." Wolski explained in his deposition that the USPS uses a "one-in-three" selection process for filling letter carrier vacancies. (LR 56.1 (a) @ 15) This process requires the hiring official to compare each applicant to two other candidates and select the person most qualified overall of the three. (Id.@ 16) In comparing applicants, the USPS considers, among other things, past employment records and criminal histories. (Id. @ 17) Bell does not dispute the "one-in-three" selection process was part of being "considered for employment" under the Settlement Agreement. (LR 56.1 (a) Pl. Resp. @ 24) What he does dispute is which factors the USPS could use in comparing him with other applicants. In particular, Bell's biggest complaint about not being selected is that Wolski (and the USPS's EEO Office when it affirmed Wolski's decisions in its "Final Agency Decision") improperly considered his past employment record and criminal history, as well as comments Bell allegedly made during the mediation about his prior convictions. He claims these matters were "resolved" during the mediation, such that Wolski could not rely on them in evaluating Bell's qualifications for the carrier job. He also says Wolski told him during the mediation that he would be given a job first, as soon as he received a call-in notice, because his name would be "at the top of the list." (Pl. Resp. , pp. 1, 2, 8; LR 56.1 (a) Pl. Resp. pp 7, 8, 10, 23; Def. Exh., Bell dep., pp. 18, 80) Under Bell's interpretation of the Settlement Agreement, once his name and score reached the carrier's register, and Postmaster Clark certified that Bell met the USPS's "personal suitability and eligibility requirements," it was

just a matter of comparing Bell'stest score with the other applicants' scores. Because Bell happened to peek at his competitor's test scores during the October 1999 call-in, and saw that his was the highest (LR 56.1 (a) Pl. Resp. @17), he believes Wolski violated the Settlement Agreement by not hiring him. The problem with Bell's argument is that the Settlement Agreement does not limit what Wolski could or could not consider when comparing Bell in the "one-in-three" selection process. It says only that Bell must meet "all the pre-hire requisites," not just certain ones. This language is clear and unambiguous on its face. The court has no doubt the parties discussed Bell's employment record and criminal history during mediation. But there is nothing in the Settlement Agreement suggesting this information suddenly became off limits in Wolski's decision-making once the parties signed the agreement. If Bell believed the true intent of the Settlement Agreement was that Wolski could no longer take into account Bell's previous employment record and criminal history in comparing him with other applicants, he either should have had something to that effect inserted in the agreement or not signed it at all. More to the point, because the agreement as written is unambiguous, any discussions the parties may have had leading up to its execution or Bell's own thoughts on what the agreement meant are immaterial. Further buttressing this conclusion is the integration clause contained in the agreement, which states, "There are no other terms or conditions of this agreement which are not expressly contained herein and none will be implied." When parties formally include an integration clause in their contract, "they are explicitly manifesting their intention to protect themselves against misinterpretations which might arise from extrinsic evidence." Much, 266 F.3d at 644 (internal quotations and citations omitted). "An integration clause is a 'clear indication that the parties desire the contract be interpreted soly according to the language used in the final agreement.'" Id. In light of the Settlement Agreement's

integration clause, nothing Wolski and Bell may have said during the mediation, or any other parol evidence for that matter, can be used to alter the clear import of the agreement's terms. As it is, the plain language of the Settlement Agreement required Bell to satisfy all of the USPS's pre-hire requirements. This included the one-in-three selection process, part of which called upon Wolski to compare the past employment records and criminal histories of the three competing applicants. Bell does not dispute he has four prior criminal convictions. (LR 56.1(a) Par. 21) He also admits there was a period of approximately six years, between 1990 and 1996, where his only job was "caring for [his] father on a fulltime basis" and "caring for [his] children," in addition to another fourteen months or so of unexplained unemployment. (Id. Par. 22) And because Bell has offered absolutely no evidence that the individuals hired instead of him had less desirable employment records or criminal histories, he cannot show Wolski breached the Settlement Agreement.

C. **POST-SETTLEMENT RETALIATION**

In its previous order, the court dismissed, among other thins, Bell's claim that Wolski retaliated against him for engaging in protected activity - i.e., Wolski refused to hire Bell, after the Settlement Agreement was signed, for filing his original informal complaint with the USPS. It did so on the ground that Bell had not exhausted his administrative remedies with respect to the retaliation claim. However, in his response to the Postmaster General's motion for summary judgment, Bell points to a line of cases holding that a plaintiff need not exhaust administrative remedies on a claim of retaliation growing out of an earlier charge of discrimination. Although the cases Bell cites are not from the Seventh Circuit, see Ingels v. Thiokol Corp., 42 F. 3d 616, 625 (10th Cir. 1994); Gupta v. East Tex. State Univ., 654 F. 2d 411, 414 (5th Cir. Unit A Aug. 1981), the same principle has found its way into Seventh Circuit case law. See McKenzie v.

Illinois Dep't of Transp., 92 F. 3d 473, 482-83 (7th Cir. 1996); Rennie v. Garrett, 896 F. 2d 1057, 1062 (7th Cir. 1990); Malhotra v. Cotter & Co., 885 F. 2d 1305, 1312 (7th Cir. 1989). In light of this "exception" to the administrative exhaustion requirement, the court recognizes it may have prematurely dismissed Bell's retaliation claim (a point the Postmaster General also tacitly concedes by not responding to it in his reply brief). For that reason, the court is ordering the parties to appear for a status hearing to discuss the possible reinstatement of this claim.

IV. CONCLUSION

For the reasons stated above, the Postmaster General's motion for summary judgment is granted and Bell's claim based on the breach of the Settlement Agreement is dismissed with prejudice.

Footnotes;

Page No.1;

John E. Potter has succeeded William Henderson, the original defendant in this case, as postmaster General, and is therefore, automatically substituted as the named defendant, pursuant to Federal Rule of Civil Procedures 25 (d) (1).

Page No. 3;

A "register" is apparently a list of eligible persons the USPS maintains for all of its various positions. (Pl. Exh. 7, Par. 341.1) Because Bell sought employment as a letter carrier, his name and score were restored to the carrier's register.

A "call -in notice" simply directs the applicant to report at a certain time and place for an interview regarding the position applied for. (Def. Exh., Wolski dep. Exh. 1)

Page No. 4;

This phrase is from a checklist form the USPS apparently uses when interviewing candidates for certain position. (Def. Exh., Bell dep. Exh. 5, Bates No. 115) After the interview, the interviewer checks either a "Yes" or "No" box, based on his assessment of whether the applicant "meets personal suitability and eligibility requirements." (Id.)

Page No. 11;

Bell also makes much of Wolski overturning Clark's determination that bell met the "personal suitability and eligibility requirements." As the facts recited above make clear, though, Wolski had the final say-so in hiring decisions, so it was ultimately his, not Clark's, place to determine Bell's

Page No. 12;

"suitability and eligibility" for the carrier position. And, as discussed infra, Wolski's decision that Bell was not qualified did not violate the terms of the Settlement Agreement.

Page No. 13;

He does, however, object to the USPS relying on these for the separate reason that they are all more than ten years old, the most recent one (the battery conviction) dating bck to 1983. Bell cites a postal regulation explaining that, where an applicant has no criminal convictions in the ten years immediately preceding the date of application, the applicant's conviction record " may not serve as the sole basis for disqualification from appointment." (Def. Exh., Wol;ski dep. Exh. 11 Par. 313.344) But simply because convictions that are more than ten years old may not be the "sole" basis for denying employment does not meant they cannot be considered at all.

Page No. 15:

Bell similarly argues the court erred in dismissing his "claims of race, color, sex and age discrimination. " (Pl. Resp., p. 8) What he means by this, as his reference to his "pre-complaint" makes clear, are his pre-settlement discrimination claims - those that initially prompted him to file an informal complaint with the USPS. (Id.) However, Bell unequivocally released those in the Settlement Agreement. (Def. Exh., Bell dep. Exh. A, "Settlement Agreement Form," p. 3) ("By signing this agreement, the counselee [Bell] withdraws any and all pending complaints, appeals, or other action relative to the matter contained in this complaint.") And any chance he had of resuscitating these claims has been altogether eliminated by the court's ruling that Wolski did not breach the agreement.

/s/ PHILIP G. REINHARD
PHILP G. REINHARD
DISTRICT JUDGE

Rockford, Illinois
December, 19, 2001

APPENDIX D

IN THE UNIED STATES DISTRICT COURT
FOR THE NORTHERN DITRICT OF ILLINOIS
WESTERN DIVISION

Civil Action No. 00 C 50164

PETER E. BELL, PLAINTIFF

v.

WILLIAM J. HENDERSON, DEFENDANT

Filed: August 18, 2000
Entered: November 16, 2000

ORDER

For the reasons stated on the reverse, defendant's motion to dismiss is granted in part and denied in part.

Plaintiff, Peter E. Bell, proceeds pro se in his complaint against defendant, William j. Henderson, Postmaster General of the United States of America. He alleges generally that defendant refused to him because of his race, color, sex, and age, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-16 ("Title VII"), and the Age Discrimination in Employment Act, 29 U.S.C. section 633a ("ADEA"), and also claims that defendant breached a settlement agreement signed by both parties. The

court has jurisdiction based on 42 U.S.C. section 2000e-5 (f) (3) and venue is proper as the alleged events occurred in this district and division, see 28U.S.C. section 1391. Before the court is defendant's motion, shich seeks either a dismissal under Federal Rules of Civil Procedure 12 or, in the alternative, summary judgment under Rule 56. Because neither party has submitted an appropriate statement of material facts as required by Local Rule 56.1, the court will treat the motion as one to dismiss under Rule 12 (b)(6). Accordingly, it will not consider any exhibits attached to the parties' briefs that are not specifically referred to in plaintiff's complaint. See Menominee Indian Tribe of Wisconsin v. Thompson, 161 F. 3d 449, 456 (7th Cir. 1998), cert. denied, 526 U.S. 1066 (1999). In February 1999, plaintiff applied for, but did not receive, a job with the U.S. Postal service. He believes defendant did not hire him because of his race (African-American), color (black), sex (male), and age (forty-four years old). However, to the extent plaintiff is attempting to state a claim of discrimination based on the events in February 1999, such a claim is barred because the parties settled that claim in a settlement agreement entered into on April 23, 19999("Settlement Agreement"). See Wilmes v. Postal Service, 810 F. 2d 130, 132-33 (7th Cir. 1987). His claims of discrimination and retaliation of four separate occasions- October 1999, December 1999. February 2000, and March 2000- must suffer the same fate, though for a different reason. With respect to these claims, plaintiff has failed to allege that he exhausted administrative remedies, including a request for pre-complaint counseling or filing a formal complaint with defendant, see 29 C.F.R. sections 1614.105, 1614.106, or that he gave the required thirty day' notice to defendant or the EEOC of his intent to file an ADEA claim, see 29 U.S.C. 633a (d); 29 C.F.R. section 1614.201. see Gibson v. West, 201F. 3d 990, 994 (7th Cir. 2000) (holding that a administrative exhaustion is precondition to filing suit in federal court). On the other hand, plaintiff may proceed on his claim regarding the Settlement Agreement. Defendant's argument that the court lacks subject matter

jurisdiction over this claim is without merit. Strictly speaking, plaintiff is not seeking to enforce the Settlement Agreement itself but instead is seeking judicial review of the "Final Agency Decision" defendant issued on February 10, 2000, after plaintiff notified dendant of its alleged noncomplaincewitth the Settlement Agreement. Because the Settlement Agreement in this case was reached under the auspices of the EEOC's administrative machinery - i.e., during the processing of plaintiff's request for pre-complaint counseling under 29 C. F. R. section 1614. 105 inin connection with what he believed to be discrimination prohibited by Title and the ADEA - the court clearly has subject matter jurisdiction oversuch a claim. See 42 U.S.C. section 2000e-16 (c) (allowing individual to file civil action in federal court within ninety days of receiving notice of final agency action); 29 C.F.R. section 1614. 504 (b) (stating that "complainant may appeal" to the EEOC for determination as to whether agency has complied with terms of settlement agreement) (emphasis added); 29 C.F.R. section 1614.110 (stating that agency's final action shall contain notice of right to appeal final action to EEOC and right to file civil action in federal district court); Rules and Regulations, Equal Employment Opportunity Commission, 57 Fed. Reg. 12, 634, 12, 636 (1992). Finally, the court disagrees with defendant that plaintiff's claim should be dismissed because he did not notify defendant within thirty days from when he "knew or should have known" of the noncompliance, as required by 29 C.F.R. section 1614.504 (a). From the complaint it appears that plaintiff's first interview after the parties signed the Settlement Agreement and claims it did not receive plaintiff's written notification until January 6, 2000- four days beyond the thirty day limit. But the court first notes that defendant may have waived this timelines objection by accepting plaintiff's request and deciding it on the merits without raising the issue during the administrative process. See Bowden v. United States, 106 F. 3d 433, 438 (D. C. Cir. 1977). Second, and more importantly, a question of fact remains as to when exactly

plaintiff's "knew or should have known" about defendant's noncompliance. Although plaintiff received the rejection letter on December 2, 1999, he also states in his complaint that the next day he received another "call-in notice for employment," dated December 2, 12999. Understandably, plaintiff may have been confused by these conflicting messages. So he followed through on this latest call-in notice, scheduled for December 16, 1999. After waiting a few weeks but not hearing anything back about the December 16 call-in, plaintiff then decided to notify defendant about its alleged noncompliance. Given this time line, it is reasonable that plaintiff would not have known about defendant's noncompliance until sometime after December 16, 1999, when he realized that defendant was not going to hire him after all.

For the reasons stated above, defendant's motion is denied in part and granted in part. To be clear, plaintiff may proceed only on his claim to review defendant's final agency decision: all other claims are hereby dismissed without prejudice.

/s/ PHILIP G. REINHARD
PHILIP G. REINHARD
DISTRICT JUDGE

Rockford, Illinois
November 16, 2000